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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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MAR 14 2005

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CM

In the matter of:

YUCATAN RESORTS, INC.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, S.A.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
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SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY

**RESORT HOLDINGS INTERNATIONAL,
INC.,**

3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
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1 **WORLD PHANTASY TOURS, INC.,**

2 **a/k/a MAJESTY TRAVEL**

3 **a/k/a VIAJES MAJESTY**

4 Calle Eusebio A. Morales

5 Edificio Atlantida, P Baja

6 APDO, 8301 Zona 7 Panama,

7 **AVALON RESORTS, S.A.**

8 Av. Coba #82 Lote 10, 3er. Piso

9 Cancun, Q. Roo

10 Mexico C.P. 77500

11 **MICHAEL E. KELLY and LORY KELLY,**

12 husband and wife,

13 29294 Quinn Road

14 North Liberty, IN 46554;

15 3222 Mishawaka Avenue

16 South Bend, IN 46615;

17 P.O. Box 2661

18 South Bend, IN 46680,

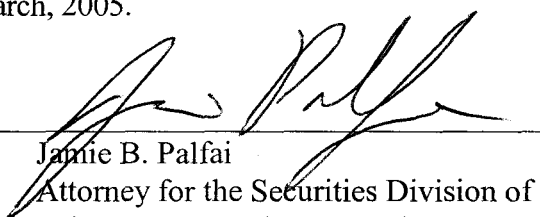
19 Respondents.

20 The Securities Division ("Division") of the Arizona Corporation Commission hereby
 21 moves for leave to present the telephonic testimony of prospective Division witnesses Thomas
 22 Crisp, Bettie Mazel, Judith Allen and Erin Harmon during the hearing of the above-referenced
 23 matter beginning on March 28, 2005. This request is submitted on the grounds that, although
 24 these individuals can provide testimony that will provide key information at this administrative
 25 hearing, special circumstances prevent their actual appearance in Phoenix, Arizona during the
 26 course of this proceeding.

For this primary reason, and for others addressed in the following Memorandum of Points
 and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

Respectfully submitted this 14th day of March, 2005.

By


 Jamie B. Palfai

Attorney for the Securities Division of the
 Arizona Corporation Commission

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Division anticipates calling Thomas Crisp, Bettie Mazel, Judith Allen and Erin Harmon as central witnesses to this hearing. Crisp, a Universal Lease investor from Prescott, Arizona, can offer probative testimony as to the various sales techniques used by a particular Universal Lease sales agent during a period starting as early as 2000. In so doing, Crisp can provide evidence supporting a number of the allegations brought by the Division in this case. Crisp is an elderly gentleman who is currently undergoing medical tests concerning possible health complications, and as such, the burdensome task of traveling down to Phoenix to provide testimony in person is impractical.

Mazel is another Universal Lease investor residing in Tucson, Arizona. As with Crisp, Mazel can also provide key information concerning the means in which a Yucatan Resorts sales agent solicited her to transfer over \$100,000 of her retirement funds into the Universal Lease program. Mazel's testimony will again provide evidence central to a number of the Division's allegations against the respondents in this case. The physical appearance of Mazel, however, is complicated by the fact that she is an elderly woman who is no longer comfortable traveling on freeways, particularly a busy Interstate highway such as that needed to reach Phoenix. Accordingly, Mazel has asked that she too be allowed to provide her testimony telephonically.

Allen is still another Universal Lease investor, currently residing in Aptos, California. Allen can provide highly probative evidence concerning respondents' purported practice of allocating specific timeshare units to specific investors. Because of her age, prior obligations, and the distance from her out-of-state residence to Phoenix, Allen has understandably requested that her testimony too be allowed via the telephone.

Harmon is a resident of Indiana, and she has personal knowledge relating to the operations of respondents Yucatan Resorts and Resort Holdings International. As such, Harmon can provide probative evidence concerning the conduct of these entities in connection with the

1 offer, sale and processing of Universal Leases over a several year period. This evidence is again
2 important in establishing a number of the allegations brought by the Division in this case.
3 Harmon has no infirmities that would prevent her from traveling, but she is a single mother with
4 two small children. She has indicated that, from a logistical standpoint, there is no way she could
5 leave her children unattended over night. Conversely, she would have no problem arranging a set
6 time to provide telephonic testimony in this matter.

7 The prospective witnesses above can offer highly probative evidence in this matter, yet
8 each faces one or more obstacles that prevent his or her appearance at this hearing. The simple
9 and well-recognized solution to this problem is to allow for telephonic testimony; through this
10 manner, not only will relevant evidence be preserved and introduced, but all parties will have a
11 full opportunity for questioning - whether by direct or cross-examination.

12 **II. ARGUMENT**

13 **A. *Telephonic Testimony in Administrative Hearings is Supported Both*** 14 ***Under Applicable Administrative Rules and through Court Decisions***

15 The purpose of administrative proceedings is to provide for the fair, speedy and cost
16 effective resolution of administratively justiciable matters. To effectuate that purpose, the
17 legislature provided for streamlined proceedings and relaxed application of the formal rules of
18 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of
19 contested administrative cases. The evidence submitted in an administrative hearing need not
20 rise to the level of formality required in a judicial proceeding, as long as it is "substantial, reliable
21 and probative." In addition, the Commission promulgated rules of practice and procedure to
22 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*
23 A.A.C. R14-3-101(B); R14-3-109(K). Allowing Crisp, Mazel, Allen and Harmon to testify by
24 telephone retains all indicia of reliability and preserves Respondents' right to cross-examination.

25 ...
26

1 Consistent with these administrative rules, courts have routinely acknowledged that
2 telephonic testimony in administrative proceedings is permissible and consistent with the
3 requirements of procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of*
4 *Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an validity of an ALJ's
5 judgment, partly on the fact that the ALJ had allowed two of the Industrial Commission's
6 witnesses to appear telephonically. The Court initially noted that telephonic testimony was
7 superior to a mere transcription of testimony because the telephonic medium "preserves
8 paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making
9 determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court then
10 went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and are
11 charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,
12 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic
13 testimony offered in this case was fully consistent with the requirement of "substantial justice."

14 Other courts have reached similar conclusions with respect to the use of telephonic
15 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of Industrial*
16 *Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was asked to
17 review a trial court's determination that a hearing officer's admittance of an inspector's
18 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it
19 from cross-examining the inspector's notes. The appellate court rejected the trial court's
20 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative
21 hearing of this nature need not be conducted according to the technical rules relating to evidence
22 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court
23 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*
24 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the
25 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings
26 involving telephonic testimony as:

1 “a pragmatic solution, made possible by modern technology, which
2 attempts to reconcile the problem of geographically separated adversaries
3 with the core elements of a fair adversary hearing: the opportunity to
 cross-examine adverse witnesses and to rebut or explain unfavorable
 evidence.”

4 *Id. at 251, 131 Cal.Rptr. at 422.*

5 Based on similar reasoning, a number of other state courts have recognized that, in the
6 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
7 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
8 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s
9 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,
10 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).
11 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of
12 administrative hearings, “fundamental fairness” is not compromised through the allowance of
13 telephonic testimony.

14 The telephonic testimony request in the present case fits squarely within the tenor of these
15 holdings. The Division is seeking to introduce the telephonic testimony of four separate
16 witnesses that could otherwise not testify; the prospective testimony of these witnesses will be
17 “substantial, reliable and probative,” and will meet all requirements of substantial justice. In
18 other words, evidence bearing on the outcome of this trial will not be barred, and respondents
19 will still have every opportunity to question the witness about his or her testimony and/or about
20 any exhibits they discuss.

21 **B. *The Arizona Corporation Commission has a well-recognized History of***
22 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

23 In light of the relaxed evidentiary and procedural rules governing administrative hearings
24 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
25 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
26 telephonic testimony in their administrative hearings to introduce probative evidence. This

position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No. 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

In this instance, the Division is seeking permission to introduce the telephonic testimony of only four of approximately twenty-one prospective witnesses scheduled to testify. As such, not only has the Division expended great resources in securing the personal appearance of over 80% of their witnesses coming from locales throughout the country, but the Division has demonstrated its willingness to bring witnesses into Phoenix to testify in person wherever feasible. Only where telephonic testimony is the only option available is the Division seeking leave to offer this form of testimony. Consistent with past determinations in this forum, leave to introduce the telephonic testimony of these 4 prospective witnesses is warranted.

III. CONCLUSION

Permitting Crisp, Mazel, Allen and Harmon to testify telephonically at the upcoming administrative hearing allows the Division to present relevant witness evidence that is expected to be reliable and probative, is fundamentally fair, and does not compromise Respondents' due process rights. Therefore, the Division respectfully requests that its motion for leave to present such telephonic testimony be granted.

RESPECTFULLY SUBMITTED this 14th day of March, 2005.

By


Jamie B. Palfai

Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
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